IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GAIL B. WARDEN, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
M.B. MCLELLAND, et al.	:	NO. 99-5797

MEMORANDUM AND ORDER

HUTTON, J. August 8 ,2001

Currently before the Court is Defendants' Motion to Dismiss the Amended Complaint (Docket No. 12), Plaintiff's response thereto (Docket No. 14), and Defendants' reply (Docket No. 19). For the reasons stated below, Defendants' Motion is **GRANTED**.

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On November 22, 1999, Plaintiffs filed a ten count complaint seeking legal and equitable relief against Defendants. On January 4, 2000, Plaintiffs added claims to their suit and served an amended complaint on Defendants. In response, Defendants moved, pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the amended complaint. This Court on April 25, 2000, this Court entered a “Final Judgment” that granted Defendants’ motion to dismiss and thereby dismissed the amended complaint in its entirety. The Court’s Order stated that it approves and adopts Defendant’s Motion to Dismiss Plaintiffs’ motion to dismiss. See Court’s Order dated April 25, 2000 (Docket No. 22). The United

States Court of Appeals vacated this Court's Order on February 21, 2001 and remanded the case for proceeding consistent with its decision. The Third Circuit mandated the Court to provide a statement of the legal standard and reasoning that served as a basis for the Court's decision. The analysis below provides the legal standard employed by the Court and the details the legal and factual basis for the Court's decision.

According to the Amended Complaint, plaintiffs Gail B. Warden, Linda B. Shappy, David McMichael Berwind, Jr., and David McMichael Berwind (hereafter collectively referred to as "plaintiffs") are the trustees of the Trust created under Deed of Charles Graham Berwind, dated February 28, 1963, for the benefit of David McMichael Berwind, et al. (referred to in the Amended Complaint as the "David Berwind Trust"). Amended Complaint at ¶¶ 1-4.[1/] In addition, plaintiffs claim that two of the named defendants (C.G. Berwind, Jr. and Bruce McKenney) are still trustees of the David Berwind Trust because their 1997 resignations as trustees were allegedly ineffective. Amended Complaint at ¶¶ 6, 17, 41, 125-126.

David McMichael Berwind and C.G. Berwind, Jr. (one of the defendants) are brothers. Amended Complaint at ¶ 24. The Complaint alleges that 83.6% of the outstanding common shares of Berwind Pharmaceutical Services, Inc. ("BPSI") are owned or

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1/ The Statement of Facts is taken from the allegations of plaintiffs' Amended Complaint which defendants take as true for purposes of this motion to dismiss only.

controlled by Berwind Group Partners, a Pennsylvania partnership comprised of several trusts which benefit C.G. Berwind, Jr. or each of his four children. Amended Complaint at ¶¶ 14-15. According to the Amended Complaint, the David Berwind Trust owns the remaining shares, which are approximately 16.4% of the outstanding common shares of BPSI. Amended Complaint at ¶ 5.

Eight of the individual defendants are or were directors of BPSI. Amended Complaint at ¶¶ 6-13. In addition, at certain points in time in the past, C.G. Berwind, Jr. was a trustee of the David Berwind Trust, as was individual defendant, Bruce McKenney, and plaintiffs allege that these individuals continue to act as trustees. Amended Complaint at ¶¶ 6, 17. The other defendants are Berwind Group Partners and Berwind Corporation, a Pennsylvania corporation which is wholly owned by Berwind Group Partners. Amended Complaint at ¶ 16.

According to the Amended Complaint, the defendants have deprived the David Berwind Trust of the fair value of its interest in BPSI by converting assets of BPSI to their own business or personal benefit, by causing BPSI to pay excessive and unreasonable management fees to Berwind Corporation, by causing BPSI to pay inappropriate dividends and by using improper accounting techniques. Amended Complaint at ¶¶ 57-58. The Amended Complaint also alleges that the Board of BPSI effected a merger on December 16, 1999 to eliminate the minority interest in BPSI, which merger

allegedly has no valid business purpose. Amended Complaint at ¶¶ 43-47, 56. A copy of the Articles of Merger, filed December 16, 1999, is attached hereto as Exhibit A.[2/] The David Berwind Trust received a Notice to Demand Payment stating that its minority interest had been converted into the right to receive a senior subordinated promissory note of BPSI due December 15, 2001 and bearing interest at the rate of ten percent compounded annually. Amended Complaint at ¶ 48.

The Amended Complaint contains thirteen Counts. The first five counts are derivative claims which the plaintiffs, as trustees, purport to bring on behalf of BPSI. They consist of two RICO claims (Counts I and II), and three counts under state law for diversion of corporate opportunity, breach of fiduciary duty and aiding and abetting breach of fiduciary duty (Counts III through V). The remaining counts are brought by plaintiffs directly and are all under state law. They seek an injunction to prevent anyone under defendants' control from taking any action to affect the interest of the David Berwind Trust in BPSI or the David Berwind Trust's ability to bring the derivative claims it has asserted in this lawsuit (Count VI), an accounting (Count VII), rescission of the merger (Count VIII), statutory appraisal (Count IX), damages and an injunction for breach of trust by C.G. Berwind, Jr. and

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2/ Documents that form the basis of plaintiffs' claims (as do the merger documents here) are properly considered as part of a motion to dismiss. In re Westinghouse Sec. Litig., 90 F.3d 696, 707 & n. 8 (3d Cir. 1996); In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n. 9 (3d Cir. 1993).

Bruce McKenney who (according to plaintiffs) are still trustees of the David Berwind Trust (Counts X and XIII), a RICO claim against C.G. Berwind, Jr. (Count XI) and a declaratory judgment against all defendants declaring the merger null and void (Count XII). As to the derivative claims, the Amended Complaint contains only the unsupported bald conclusory allegation that making a demand upon the directors would cause irreparable harm to the David Berwind Trust and BPSI. Amended Complaint at ¶ 55.

As set forth below, plaintiffs' allegations are insufficient to state a claim.

II. ARGUMENT

A. Standard

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A court may grant a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted where plaintiff can prove no facts to support the relief requested. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988). In deciding a motion to dismiss, the court must accept as true all well-pleaded factual allegations in the complaint and must view all reasonable inferences from these facts in the light most favorable to the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Wisniewski v. Johns-Manville

Corp., 759 F.2d 271, 273 (3d Cir. 1985). "The court, however, need not accept as true legal conclusions or unwarranted factual inferences." Rosenbaum & Co. v. H.J. Myers & Co., Inc., No. 97-824, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,557 at 97,768 (E.D. Pa. Oct. 9, 1997) (citing Conley, 355 U.S. at 45-46).

Even taken as true and reviewed under these standards, plaintiffs' Amended Complaint fails to state a claim against defendants and are dismissed.

B. Plaintiffs' Derivative Claims (Counts I Through V) Must Be Dismissed For Failure To Comply With The Federal And State Requirements Applicable To Derivative Suits

The first five counts are brought by plaintiffs derivatively, purporting to act on behalf of BPSI, against some or all of the defendants. However, as defendants noted in Defendants' Original Memorandum at 5-7, shareholders may not initiate litigation "on behalf of" a corporation for any perceived wrong to the corporation. Instead, the shareholder must follow stringent requirements under both the Federal Rules of Civil Procedure and state law before a court will entertain a derivative suit. Although the Amended Complaint contains at least some allegations concerning these requirements (in contrast to the original complaint which was utterly devoid of any averments on this crucial issue), plaintiffs still have failed to meet the strict requirements under Pennsylvania law (to which the federal courts look for the applicable standard), and accordingly, these claims

must be dismissed.

Federal Rule of Civil Procedure 23.1 requires, inter alia, that a derivative complaint "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reason for the plaintiff's failure to obtain the action or for not making the effort." Fed. R. Civ. P. 23.1. Because Rule 23.1 gives little dimension to the requirements for demand, state law of the state of incorporation fills in the contours of the demand mandate. B.T.Z., Inc. v. Grove, 803 F. Supp. 1019, 1020 (M.D. Pa. 1992).

Pennsylvania law requires that a demand be made to the company's board before a shareholder may bring suit derivatively. Cuker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997). In Cuker, the Pennsylvania Supreme Court specifically adopted the American Law Institute Principles of Corporate Governance ("ALI Principles") relating to the demand requirement. The "demand rule" mandates that:

> (a) Before commencing a derivative action, a holder or a director should be required to make a written demand upon the board of directors of the corporation, requesting it to prosecute the action or take suitable corrective measures, unless demand is excused under § 7.03(b). The demand should give notice to the board, with reasonable specificity, of the essential facts relied upon to support each of the claims made therein.

Cuker, 547 Pa. at 615-616, 692 A.2d at 1050.

Pursuant to § 7.03(b), the demand requirement is excused "only

if the shareholder shows that irreparable injury to the corporation would otherwise result, and then demand should be made promptly after commencement of the action." Drain v. Covenant Life Ins. Co., 551 Pa. 570, 581, 712 A.2d 273, 278 (1998) (emphasis added). Section 7.03(b) does not allow merely conclusory allegations but requires a "specific showing" of irreparable harm, and even if such a showing has been made, demand should be made promptly after the commencement of the action. Cuker, 547 Pa. at 616, 692 A.2d at 1050 (emphasis added). "If irreparable injury would not result, the court should dismiss a derivative action that is commenced before the response of the board to a demand unless the board does not respond within a reasonable time." Drain, 551 Pa. at 581. 712 A.2d at 278 (emphasis added).[3/]

The demand requirement is not merely a procedural technicality, but upholds several "significant public policies" in that it "encourages competent individuals to become directors . . . recognizes that business decisions frequently entail some degree of risk and consequently provides directors broad discretion in setting policies without judicial or shareholder second-guessing . . . [and] prevents courts from becoming enmeshed in complex corporate decision-making, a task they are ill-equipped to perform." Cuker, 547 Pa. at 607, 692 A.2d at 1046 (citations

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3/ Tyler v. O'Neill, 994 F. Supp. 603 (E.D. Pa. 1998), aff'd without op., 189 F.3d 465 (3d Cir. 1999), petition for cert filed, (November 22, 1999) examines the demand requirement without discussing either Cuker or Drain, and therefore, does not accurately reflect current Pennsylvania law on this issue.

omitted). The Pennsylvania Supreme Court has held that "[d]ecisions regarding litigation by or on behalf of a corporation, including shareholder derivative actions, are business decisions as much as any other financial decisions." Id. at 611, 692 A.2d at 1048. In adopting the demand rule, and other sections of the ALI Principles, the Pennsylvania Supreme Court found that "[t]hese sections set forth guidance which is consistent with Pennsylvania law and precedent, which furthers the policies inherent in the business judgment rule, and which provides an appropriate degree of specificity to guide the trial court in controlling the proceedings in . . . litigation." Id. at 613, 692 A.2d at 1049.

Plaintiffs here have made only a feeble effort to comply with the demand rule under the Federal Rules of Civil Procedure and state law. They have not pled that they made such a demand. Rather, they have attempted to plead that they are excused from making a demand because such a demand would be futile. Amended Complaint at ¶¶ 49-52. However, futility is not the standard under Pennsylvania law; a specific showing of irreparable harm to the corporation is. Thus, these allegations do nothing to satisfy the demand requirement.

In one conclusory paragraph, plaintiffs do allege that the David Berwind Trust and BPSI would suffer irreparable harm if a demand were required to be made. Amended Complaint at ¶ 55. This allegation is insufficient because irreparable harm to the minority

shareholder (the David Berwind Trust) is not the touchstone. More importantly, plaintiffs have provided nothing more than unsupported conclusory allegations despite the fact that Pennsylvania law requires a "specific showing." Nothing in the Amended Complaint even attempts to show with any degree of specificity how, when or why BPSI would be irreparably harmed if a demand were required to be made or what the irreparable harm would be. If courts allowed mere conclusory averments such as these to satisfy the demand requirement, the strict demand requirement adopted by the Pennsylvania Supreme Court in Cuker would be vitiated, and the salutary policies underlying such a requirement would be thwarted.

Moreover, § 7.03 expressly states that even if a specific showing of irreparable harm has been made, demand "should be made promptly after commencement of the action." Cuker, 547 Pa. at 616, 692 A.2d at 1050 (emphasis added). Plaintiffs commenced this action on November 22, 1999. As their Amended Complaint reveals, they have not made any demand on the board -- over eight weeks later. This is hardly "prompt." Even when plaintiffs' noncompliance was highlighted by defendants in their earlier motion to dismiss, plaintiffs did not submit a demand, but rather chose to file an Amended Complaint which futilely tries to allege that the demand requirement was excused and overlooks the requirement under Cuker to make a demand after suit is filed. Plaintiffs' own actions, therefore, show their failure to comply with the

requirements under Pennsylvania law, to which the federal courts must look to provide the standards for Rule 23.1.

Failure to comply with this necessary prerequisite mandates dismissal of these derivative claims. Accordingly, all the derivative claims (Counts I through V) are dismissed.[4/]

C. Even If The Derivative Claims Were Properly Pled, The RICO Claims (Counts I, II and XI) Should Be Dismissed For A Number Of Independent Reasons

In addition to the fact that plaintiffs' RICO claims should be dismissed because they are derivative and plaintiffs have failed to meet the demand requirements necessary to bring a derivative claim, the RICO claims fail on the merits as well. Count I of the Amended Complaint alleges a violation of § 1962(c) of RICO. Section 1962(c) makes it unlawful "for any person employed by or associated with [an interstate] enterprise . . . to conduct or to participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Thus, plaintiffs must allege that defendants "conduct[ed] or participat[ed]" in an "enterprise's affairs through a pattern of racketeering activity." Count II of the Amended

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4/ Moreover, there is a split among the courts about whether a shareholder still has standing to pursue derivative claims after a merger has occurred, and the shareholder no longer owns the stock. Compare, Overberger v. BT Fin. Corp., 106 F.R.D. 438 (W.D. Pa. 1985), with Drain v. Covenant Life Ins. Co., 454 Pa. Super. 143, 153-158, 685 A.2d 119, 124-127 (1996), aff'd. on other grds., 551 Pa. 570, 712 A.2d 273 (1998). Given the numerous other reasons to dismiss the plaintiffs' derivative claims in this case, the Court need not reach this issue, but defendants reserve their right to raise it later if necessary.

Complaint alleges a violation of § 1962(d) which makes it unlawful to conspire to violate § 1962(c). Count XI, which is not brought derivatively, alleges that C.G. Berwind, Jr. violated Section 1962(c).

Counts I, II and XI of the Amended Complaint lack merit for at least four independent reasons, namely plaintiffs: (1) have not pled fraud with particularity; (2) have not sufficiently pled any injury that flowed from the purported predicate acts; (3) have not satisfied the requirement of showing continuity; and (4) have not alleged that they relied upon any alleged predicate acts by defendants. In addition, the claims against the former directors fail because the alleged predicate acts began after their tenure as directors ended, and Count XI should be dismissed because it is a derivative claim that cannot be brought directly.

1. The RICO Fraud is Not Pled with Particularity

The RICO claims should be dismissed because the Amended Complaint fails to allege the RICO predicate acts with particularity as required by Federal Rule of Civil Procedure (9)(b) ("Rule 9(b)"). Rule 9(b) provides that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." This pleading requirement is applicable to RICO actions claiming fraud as the racketeering activity. Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 674 (3d Cir.1988). Plaintiffs here have completely failed to

comply with these requirements.

The alleged predicate acts on which plaintiffs base their RICO claims are mail and wire fraud in violation of 18 U.S.C. §§1341 and 1343. In the Amended Complaint, in contrast to the original complaint, plaintiffs now claim that the purported scheme began in 1996 and continues to the present day. Amended Complaint at ¶ 83. In addition, plaintiffs have added boilerplate allegations throughout the Amended Complaint that "[d]efendants used the United States Mails and interstate telephone and facsimile communications in connection with and in furtherance of their" purportedly improper conduct. Amended Complaint at ¶¶ 59, 65, 68, 70, and 74. However, plaintiffs fail to identify any act of mail fraud or indeed any specific communication prior to the electronic mail message dated December 10, 1998. Amended Complaint at ¶ 83(i).

Mere bald assertions that defendants engaged in violations beginning in 1996 or that they used the mail and interstate telephone and facsimile communications fail to meet the requirements of Rule 9(b). The Court of Appeals for the Third Circuit affirmed the grant of a motion for summary judgment in favor of defendants on RICO claims based on mail fraud. Annulli v. Panikkar, 200 F.3d 471 (3d Cir. 1999), abrogated on other grounds, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000). As part of its opinion, the court analyzed the evidence in support of the mail and wire fraud and found that the mere existence of an interstate telephone call or a canceled check were insufficient "absent some

explanation in the record as to why this telephone bill and canceled check have anything to do with the Defendants' alleged racketeering activity." Id. at *11, n. 10.

In the Annulli decision, the Third Circuit cited Scheiner v. Wallace, 860 F. Supp. 991, 997-998 (S.D.N.Y. 1994) for the proposition that "when alleging mail and wire fraud as predicate acts in a RICO claim, plaintiff's pleadings must identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentations." Annulli, 200 F.3d 189, 201, n. 10. Accord Blount Fin. Services, Inc. v. Walter E. Heller and Co., 819 F.2d 151, 152 (6th Cir. 1987) (granting a motion to dismiss the RICO claims on Rule 9(b) grounds) (also cited favorably in Annulli). Scheiner granted a motion to dismiss RICO claims because even though plaintiffs identified nine communications, they failed to meet the standards of Rule 9(b). The court found that "[t]he fact that the Defendants communicated amongst themselves about something hardly constitutes mail fraud within the meaning of § 1341 and certainly fails the particularity standards required by Rule 9(b)." Scheiner, 860 F. Supp. at 998.

In this case, plaintiffs do not even come close to meeting these strict standards. As to C.G. Berwind, Jr. (Count XI), the Amended Complaint never identifies the purported "pattern of violations" or "series of transactions" that forms the basis of the

allegations. Amended Complaint at ¶¶ 136-137. The only specific transaction that is identified is the Zymark acquisition (Amended Complaint at ¶ 138), but the Amended Complaint never describes how any purported mail or wire fraud by C.G. Berwind, Jr. was committed in connection with that transaction. Thus, the claims as to C.G. Berwind, Jr. consist of mere bald conclusory allegations that are unsupported by any factual showing which would comply with Rule 9(b). As such, these claims should be dismissed. As the Sixth Circuit noted in Blount: "Rule 9(b) requiring 'averments of fraud . . . with particularity' is designed to allow the District Court to distinguish valid from invalid claims in just such cases as this one and to terminate needless litigation early in the proceedings." Blount, 819 F.2d at 153.

As to the derivative claims (Counts I and II), although the Amended Complaint now avers that the scheme purportedly began in 1996, no communication earlier than late 1998 has been alleged. Amended Complaint at ¶ 83. Thus, just as with Count XI as to C.G. Berwind, Jr., all claims based upon conduct prior to late 1998 should be dismissed based on plaintiffs' complete and utter failure to comply with Rule 9(b) by failing to make any showing at all (let alone a sufficient one) as to mail and wire fraud.

To the extent that plaintiffs attempt to base their RICO claims against C.G. Berwind, Jr., or any of the defendants, on the "series of transactions" alleged in the Amended Complaint (Amended

Complaint at ¶ 137), the Third Circuit foreclosed such pleading in Annulli by ruling that garden-variety state law torts do not constitute RICO predicate acts. Annulli, 200 F.3d at 199. As the Third Circuit explained:

> if garden-variety state law crimes, torts and contract breaches were to constitute predicate acts of racketeering (along with mail and wire fraud), civil RICO law, which is already a behemoth, would swallow state civil and criminal law whole. Virtually every litigant would have the incentive to file their breach of contract and tort claims under the federal civil RICO Act, as treble damages and attorney's fees would be in sight. We will not read language into § 1961 to federalize every state tort, contract, and criminal law action.

Id. The Third Circuit emphasized that for actions to rise to the level of RICO predicate acts, plaintiffs must show intentionally fraudulent conduct. Id; see also Blount, 819 F.2d at 152-153 (holding that absent allegations of intentional fraud, "[s]ending a financial statement which misconstrues the prime rate provided by the terms of the contract . . . does not amount to a RICO mail fraud cause of action.") (cited in Annulli as an example of conduct that is not a RICO predicate act). This holding just reinforces the necessity and importance of compliance with Rule 9(b) and shows that nothing in the Amended Complaint meets this requirement.

The remaining derivative claims are based upon seven pieces of correspondence from 1998 and 1999 that plaintiffs claim constitute mail and wire fraud. See Amended Complaint at ¶ 83. Although the Amended Complaint identifies the sender and recipient of each piece of correspondence, it does not state with any specificity how the

mailing or electronic transmission of these documents constituted fraud, nor does it identify the content of the alleged omission or misrepresentation in each piece of correspondence. Indeed, the Amended Complaint states only in a very broad manner the general subject matter of each piece of correspondence. For example, the second alleged predicate act concerns "the delivery of documents" that are designated "as confidential and proprietary to BPSI." Amended Complaint at ¶ 83(ii). Nothing in the Amended Complaint identifies what documents were being delivered, by whom, when or how they were fraudulent, or why designating them as confidential and proprietary was fraudulent. Similarly, the fourth and fifth alleged predicate acts relate to correspondence concerning the delivery of audited financial statements, precisely the type of correspondence that the Sixth Circuit in Blount (as cited favorably by the Third Circuit in Annulli), found insufficient to show a predicate act unless accompanied by allegations of intentional fraud. No such allegations are found in the Amended Complaint.

As the court noted in Scheiner, the fact that these people communicated among themselves -- which is all the Amended Complaint shows -- hardly constitutes mail or wire fraud; rather, it is to be expected given the minority interest in BPSI that the David Berwind Trust had at that time. Indeed, had communications not been sent to the David Berwind Trust, plaintiffs likely would claim some other violation of the law. Accordingly, because the Amended

Complaint totally lacks the requisite specificity for allegations of fraud, plaintiffs' RICO claims are dismissed.

2. Plaintiffs Have No Standing Because There Is No Causal Connection Between the Purported Predicate Acts and the Alleged Injuries

In addition, as noted in Defendants' Original Memorandum at 8-10, plaintiffs lack standing to assert their RICO claims. In order to prevail on a civil action for damages under RICO, a plaintiff must allege an injury to his or her business or property by reason of a violation of § 1962 and plead the requisite causal connection between the injury and the violation. Tri-County Concerned Citizens Ass'n. v. Carr, No. Civ. A. 98-4184, 1998 WL 966019 at *6 (E.D. Pa. Nov. 20, 1998). To have standing to bring a claim under RICO, a plaintiff must establish that the alleged damages were proximately caused by a defendant's alleged racketeering activity. Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 495-97 (1985); Brittingham v. Mobil Corp., 943 F.2d 297, 304 (3d Cir. 1991). In this case, plaintiffs purport to bring their claims derivatively on behalf of BPSI and assert that BPSI has been deprived "of business opportunities and other assets belonging to the Company." Amended Complaint at ¶ 84. The predicate acts constituting the RICO violation as pled by plaintiffs are supposed acts of mail and wire fraud beginning on December 10, 1998 and ending on September 9,

1999. Amended Complaint at ¶ 83.

As noted above, the bald conclusory allegations concerning events in 1996 should not be considered because plaintiffs failed to identify even a single communication during that time period. Moreover, because they fail to describe a predicate act of mail or wire fraud, plaintiffs likewise fail to demonstrate how there could be any causal connection between the alleged mail or wire fraud (whatever it was) in 1996 and any injuries they purportedly suffered.

As to the seven pieces of correspondence that are identified, there is no causal connection between these alleged predicate acts and the alleged injuries because the purported predicate acts all occurred after (in some cases years after) the purported injuries. For example, the purported lost business opportunity involved an acquisition made in 1996, well before any of the alleged predicate acts. Amended Complaint at ¶¶ 59-62. Similarly, the supposedly improper cash reserves, loans and depressed earnings all occurred over "the past ten years." Amended Complaint at ¶¶ 63-66. The only other alleged injuries all refer to payments that were made in 1997 and 1998 (Amended Complaint at ¶¶ 72, 74, 75) or earnings and capital expenditures made in 1998 (Amended Complaint at ¶¶ 71, 76-78) or the decision to become involved in a jet aviation partnership which is not identified by date (Amended Complaint at ¶¶ 69-70).

Nothing in the Amended Complaint shows any connection (causal or otherwise) between the alleged predicate acts in December 1998 and several months in 1999 and the purported injuries. For example, sending out a copy of audited financial statements for 1998 in the spring of 1999 (predicate acts four and five) did not and could not cause BPSI to make the payments or expenditures or decisions alleged above. To the contrary, the predicate acts alleged by plaintiffs have no relation to the supposed injuries suffered. Because plaintiffs have not been injured by the pattern of racketeering activity they allege, they lack standing to assert their RICO claims, and Counts I and II of the Complaint must be dismissed, as well as Count XI.

3. Plaintiffs Have Not Satisfied the Requirement of Showing Continuity

Just as in the original complaint, in the Amended Complaint, plaintiffs have failed to sufficiently plead a "pattern of racketeering activity," a required element for a RICO claim and an independent basis to dismiss the claims. In H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 241- 43 (1989), the Supreme Court held that a pattern of racketeering activity requires that the alleged predicate acts pose a "threat of continued criminal activity." Putting aside plaintiffs' failure to plead properly the commission of any predicate act of racketeering activity as discussed earlier, plaintiffs have also failed to plead

a continued threat of criminal activity.

Continuity may be either closed-ended, referring "to a closed period of repeated conduct," or open-ended, meaning "past conduct that by its nature projects into the future with a threat of repetition." Id. In H.J., the Supreme Court further held that where plaintiffs allege a RICO violation over a closed period of time, the related predicate acts must last a “substantial period of time.” Id. at 242. In Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 611 (3d Cir. 1991), this Circuit held that alleged racketeering activity which takes place over a period of less than one year is, per se, not “substantial” and cannot as a matter of law satisfy the continuity element.

There can be little question that, based on the purported facts in this case, the alleged pattern is closed-ended, which requires repeated criminal conduct over a “substantial” closed period of time. Id. The pattern alleged by plaintiffs consists of allegations of mail and wire fraud occurring between December 1998 and September 1999. Given that the basis of plaintiffs’ Amended Complaint is that defendants have improperly effectuated a “freeze-out” merger (a merger expressly permitted under the BCL) and that merger has now taken place, there was and continues to be no threat of continued criminal conduct in the future. The plaintiffs’ minority interest in BPSI has now been converted into the right to receive a note for their shares, and they have no ongoing

relationship with the defendants. As such, the Amended Complaint alleges a closed-ended pattern of activity lasting no more than approximately nine months and thereby fails to allege the requisite "continuity" element.

Plaintiffs cannot rescue their RICO claim by throwing in unsupported allegations that the pattern began in 1996 (thus removing it from the one year per se rule) or that the pattern threatens to continue in the future. As noted above, plaintiffs have identified absolutely no predicate acts of alleged mail or wire fraud from any time earlier than December 1998. A conclusory allegation without factual basis is not enough to salvage a deficient claim. Similarly, plaintiffs provide no basis in fact, law or logic to support their claim that the alleged pattern threatens to continue in the future.

The Amended Complaint avers that a merger has been effectuated, and a notice to demand payment has been sent to the David Berwind Trust. Amended Complaint at ¶¶ 46-47. Plaintiffs allege that they are seeking a "fair price" for their shares and an appraisal proceeding (Count IX), thereby acknowledging that the only ongoing relationship between these parties will be to obtain an appraisal of the minority interest. If the parties cannot agree on the "fair price," it will be determined by the appropriate court. Thus, the allegations of the Amended Complaint and the statutory scheme for dissenter's rights belie any suggestion that

defendants will have any type of ongoing relationship with plaintiffs or any opportunity to cause them any harm -- although defendants deny that they have ever caused any harm to plaintiffs in the past. Whatever the merit of their claims, the “scheme” is concluded. Therefore, the analysis of a closed period of time applies, and because the only predicate acts that plaintiffs can

identify took place over less than a year, plaintiffs have not satisfied the continuity element.

4. Plaintiffs' RICO Claims Fail for Lack of Reliance

Furthermore, the Amended Complaint does not allege, as it must, that plaintiffs relied on any supposed misrepresentation or omission contained in the correspondence. Courts within this Circuit generally have held that in order to state a RICO claim, the plaintiff must show reliance on the underlying mail or wire fraud. See, e.g., Torres v. CareerCom Corp., No. 91-3587, 1992 WL 245923 (E.D. Pa. Sept. 18, 1992); Rosenstein v. CPC Int'l Inc., No. 90-4970, 1991 WL 1783 (E.D. Pa. Jan. 8, 1991); Strain v. Nutri/System, Inc., No. 90-2772, 1990 WL 209325 (E.D. Pa. Dec. 12, 1990).[5/] The Blount case, cited favorably by the Third Circuit in

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5/ Although the Third Circuit has not ruled on the issue, the majority of federal Courts of Appeal require reasonable reliance in the context of a civil RICO claim based on mail or wire fraud. See, e.g., Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 (4th Cir.1996) (holding that in the context of mail and wire fraud, a "plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation"); Central Distributors of Beer, Inc. v. Connecticut, 5 F.3d 181, 184 (6th Cir.1993) ("[Plaintiff] cannot maintain a civil RICO claim against these defendants absent evidence that the defendants made misrepresentations or omissions of material fact to [plaintiff] and evidence that [plaintiff] relied on those misrepresentations or omissions to its detriment."), cert. denied, 512 U.S. 1207, 114 S.Ct. 2678, 129 L.Ed.2d 812 (1994); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir.1992) (noting that "[i]n the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on [.]"), cert. denied, 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993); Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir.1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to

Annulli, expressly holds that "[f]raud alleged in a RICO civil complaint for mail fraud must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing plaintiff's reliance on defendant's false statement of fact." Blount, 819 F.2d at 152.

Absent from the Amended Complaint in this case is any allegation that plaintiffs relied on any supposedly fraudulent statements contained in the correspondence identified. In fact, the Amended Complaint lacks any allegations that plaintiffs relied upon anything at all (whether specifically identified or not) that they received from defendants. This is not surprising given that plaintiffs failed to identify any fraudulent statements in the first place and given that the correspondence that has been identified occurred months if not years after the purported injuries. Because plaintiffs fail once again to make the requisite allegations necessary to support a RICO claim, Counts I, II and XI of the Amended Complaint are dismissed.

5. The Former Berwind Directors Did Not "operate" the "association in fact" Enterprise Because the Alleged Conduct Began After Their Tenures as Directors Ended

In addition to the other RICO shortcomings, plaintiffs' RICO

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his detriment on misrepresentations made in furtherance of that scheme."), cert. denied, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991); Curatola v. Ruvolo, 949 F. Supp. 223, 225 (S.D.N.Y. 1997) ("When mail fraud is pled as a RICO predicate act, to establish the required causal connection a plaintiff must show reliance on the defendant's misrepresentations and injuries caused by that reliance.").

claims against defendants J.J. Byrne, Jr., J.S. Dulaney, K.C. Karlson, and R.M. Cohn must fail because plaintiffs cannot establish that these defendants "operated" the alleged "association-in-fact" enterprise.

In Reves v. Ernst & Young, 507 U.S. 170 (1993), the Supreme Court concluded that a defendant is not liable under RICO unless he or she has participated in the "operation or management of the enterprise itself." Id. at 170. In this case, plaintiffs merely assert in a conclusory fashion that the defendants engaged in pattern of mail and wire fraud violations "through their operation and control of the Berwind Enterprise." Amended Complaint at ¶ 83.

The pattern of mail and wire fraud which plaintiffs identify, however, took place between December 1998 and September 1999 because (as noted earlier) the boilerplate allegations concerning conduct in 1996 are not sufficient. Even if the allegations concerning predicate acts beginning in December 1998 were properly pled (which they are not for the numerous reasons set forth above), defendants Byrne, Dulaney, Karlson, and Cohn were not directors of BPSI during this time. Amended Complaint at ¶¶ 10, 11, 12, 13. Therefore, these defendants could not have "operated or controlled" the Berwind Enterprise during the period of time when the predicate acts were supposedly taking place.

6. Plaintiffs Lack Standing to Bring Direct Claims Against C.G. Berwind, Jr.

In the Amended Complaint, plaintiffs allege on their own behalf -- rather than derivatively -- a violation of § 1962(c) by C.G. Berwind, Jr. (Count XI). This claim was not included in the original complaint. As discussed above, plaintiffs have failed to show how C.G. Berwind, Jr. engaged in any predicate acts of mail or wire fraud, and Count XI are dismissed on this basis. Even if plaintiffs had made sufficient allegations regarding C.G. Berwind, Jr.'s purported mail and wire fraud, however, the claim still fails because plaintiffs have not alleged that they have suffered any injury that is distinct from the injury allegedly suffered by BPSI as a result of C.G. Berwind, Jr.'s alleged breach of fiduciary duty to BPSI. As such, plaintiffs' RICO claim against C.G. Berwind, Jr. is derivative, and plaintiffs lack standing to bring this claim directly. Accordingly, because plaintiffs improperly brought Count XI as a direct claim, it is dismissed.

In In re Sunrise Securities Litigation, the court held that "[a]n individual indirectly injured by a RICO violation cannot maintain a RICO action in his or her own name, since his or her claims are derivative of the directly injured party's claims..." In re Sunrise Sec. Litig., 108 B.R. 471, 476 (E.D. Pa 1989). See also Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347, 348-353 (5th Cir. 1987) (shareholders' claim under RICO that defendants' action caused shareholders' stock to decline in value was derivative and

could not be maintained by shareholders individually). Here, the basis of plaintiffs' claims is that defendants allegedly devalued the interest of the minority shareholder, the David Berwind Trust, in BPSI by converting assets of BPSI to their own business or personal benefit, by causing BPSI to pay excessive and unreasonable management fees to Berwind Corporation, and by causing BPSI to pay inappropriate dividends by using improper accounting techniques. Amended Complaint at ¶¶ 57-58.

Plaintiffs' allegations against C.G. Berwind, Jr. are no different. Indeed, plaintiffs allege that C.G. Berwind, Jr. breached his fiduciary duty to BPSI and "directed" and "orchestrated" the transactions which deprived the David Berwind Trust of the fair value of its interest in BPSI. Amended Complaint at ¶¶ 137-38. Accepting plaintiffs' allegations as true, BPSI is the directly injured party, and plaintiffs' claims are derivative. As such, plaintiffs lack standing to bring a direct claim for RICO violations against C.G. Berwind, Jr., and Count XI are dismissed.

D. Even If The Derivative Claims Were Properly Pled, Count III And Portions Of Count IV And V Are Time-Barred

Count III of the Amended Complaint purports to be brought derivatively against the present and former directors of BPSI and alleges that these individuals breached their fiduciary duty to BPSI by diverting business opportunities available to BPSI, specifically the opportunity to purchase equity interests in

another company, Zymark Corporation ("Zymark"). Amended Complaint at ¶¶ 93-94. Although plaintiffs have renamed this Count as one for diverting (rather than usurping) corporate opportunity, they have done nothing to salvage the claim from the bar of the statute of limitations as defendants argued previously. This same bar applies to some of the claims for breach of fiduciary duty (Count IV) and aiding and abetting liability (Count V) (neither of which has been changed) which relate to actions that occurred over two years ago.

According to the Amended Complaint, the transaction concerning Zymark was consummated on September 3, 1996. Amended Complaint at ¶ 59. See also Amended Complaint at ¶¶ 60-62. Similarly, portions of Count IV refer to actions which, according to the Complaint, occurred "for the past ten years." Amended Complaint at ¶¶ 65-66. Other claims are based upon events for which no date is specified (the financing of Berwind Aviation) (Amended Complaint at ¶¶ 69-70) or events which occurred in fiscal year 1997. Amended Complaint at ¶ 72. In addition, portions of the Amended Complaint refer to alleged misconduct that purportedly began "[i]n approximately 1992" or "in the mid-1990's." Amended Complaint at ¶¶ 36, 57. However, plaintiffs' original complaint was not filed until November 22, 1999, years after some of these events purportedly occurred.

The statute of limitations under Pennsylvania law for claims of breach of fiduciary duty is two years. Maillie v. Greater

Delaware Valley Health Care, Inc., 156 Pa. Commw. 582, 628 A.2d 528 (1993), appeal denied, 537 Pa. 668, 644 A.2d 1204 (1994); 42 Pa. C.S.A. § 5524(7).[6/] A federal district court has not hesitated to dismiss claims for breach of fiduciary duty under Pennsylvania law when it was apparent from the face of the complaint that the claims were untimely. Zimmer v. Gruntal & Co., Inc., 732 F. Supp. 1330, 1335-1336 (W.D. Pa. 1989). The claims relating to the Zymark transaction are just as defective as the claims brought in Zimmer and, therefore, even if they were properly pled, they should be dismissed as time-barred. In addition, the portions of the breach of fiduciary duty claim (Count IV) and aiding and abetting breach of fiduciary duty (Count V) that relate to conduct that occurred more than two years ago (i.e., before November 22, 1997) are also dismissed as time-barred for the same reasons.

E. Plaintiffs' Claims For Equitable Relief Are Dismissed Because Controlling Precedent Limits Them To Their Appraisal Rights

In addition to the fundamental flaws with their derivative, RICO and state law claims, plaintiffs' claims for injunction, accounting and rescission (Counts VI through VIII) also lack merit. The Pennsylvania Supreme Court has ruled that after a merger has

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6/ Earlier cases applying a different statute of limitations were decided based upon the law as it existed prior to 1982 when the Pennsylvania legislature amended the statute of limitations to add 42 Pa.C.S.A. § 5524(7). See In re Numedco, Inc., No. 91-0223S, 1991 WL 204908 at *2 (Bankr. E.D. Pa. Oct. 7, 1991) (citing cases); Johns v. Estate of Cheeseman, 457 Pa. 414, 322 A.2d 648 (1974).

occurred, the shareholder is limited to the appraisal remedies provided under the Business Corporation Law ("BCL"). In re Jones & Laughlin Steel Corp., 488 Pa. 524, 412 A.2d 1099 (1980). No injunctive relief is permitted. Although this point was raised in the motion to dismiss the original complaint, plaintiffs have again done nothing to remedy this failing.

As explained in Defendants' Original Memorandum at 15-17, Jones & Laughlin involved a situation in which the merger had been consummated and the minority shareholders alleged that the merger was unlawful and should be invalidated. Id. at 528-529, 412 A.2d at 1102. The Supreme Court acknowledged that under certain limited circumstances, a minority shareholder could obtain an injunction before the merger occurred. Id. at 530-531, 412 A.2d at 1102-1103. The Supreme Court held that "[o]ur concern, however, does not change the view that appellants' post-merger remedies were limited to the appraisal of the fair value of their stock." Id. at 534, 412 A.2d at 1104. Accordingly, the Supreme Court affirmed the Superior Court's decision "that appellants' sole post-merger remedy is the statutory appraisal proceeding of Section 515 of the Business Corporation Law (BCL)." Id. at 527, 412 A.2d at 1101.[7/]

The BCL expressly provides that appraisal rights shall be the exclusive remedy for the dissenting shareholder. 15 Pa. C.S.A. §

7/ To protect the minority shareholder, the BCL contains a comprehensive scheme of dissenter's rights. 15 Pa. C.S.A. § 1571 et seq.

1105. While Section 1105 does allow a dissenting shareholder to challenge a merger on the limited basis of fraud or fundamental unfairness, Jones & Laughlin made clear that once the merger has been completed, the appraisal statute provides the only remedy. Moreover, nothing in the BCL allows a dissenting shareholder to obtain an accounting or to rescind a merger.

Therefore, plaintiffs have no right to demand any of the forms of equitable relief that they seek: injunction, accounting or rescission. Because the merger has now been consummated, (Amended Complaint at ¶¶ 44-47 and Exhibit A), Pennsylvania law now limits plaintiffs to their remedies under the appraisal statute. Accordingly, Counts VI through VIII are dismissed.

F. Plaintiffs' Injunction Claims Fail To Show Irreparable Harm

In addition to the fact that plaintiffs are limited to appraisal rights, their claims for injunctive relief (Counts VI and XIII) are dismissed for failure to show irreparable harm.

While plaintiffs aver generally that they have no adequate remedy at law and will suffer irreparable harm (Amended Complaint at ¶¶ 115 and 149), nothing in the Amended Complaint or the law supports these allegations. As noted in Defendants' Injunction Memorandum at 4-7, all this case concerns is money. Numerous courts have recognized that minority shareholders can be adequately compensated by money damages.

As the Delaware Chancery Court found in denying the requested injunction in Yanow v. Scientific Leasing, Inc., Nos. Civ.A. 9536, 9561, 1988 WL 8772, at *6, 13 Del. J. Corp. L. 1273, 1284 (Del. Ch. Feb. 8, 1988), "[i]f plaintiffs are correct in their view that the [] acquisition price is unfair, money damages or an appraisal would be a sufficient remedy." See also In re Western Nat'l Corp. Shareholders Litig., No. 15927, 1998 WL 51733 (Del. Ch. Feb. 4, 1998) (if plaintiffs ultimately proved a breach of fiduciary duty by directors, the shareholders could be compensated by an award of damages and no irreparable harm had been shown). In Kahn v. Household Acquisition Corp., No. Civ.A. 6293, 1980 WL 3185 (Del. Ch. Dec. 12, 1980), the court declined to enjoin a shareholder who controlled over 88 percent of the voting shares of the company from voting its shares in favor of a merger of the company into a wholly-owned subsidiary of the shareholder. The court found that "what the plaintiff is basing her injunction application upon is clearly a claim of inadequate price." Id. at *4. Accordingly, there was no irreparable harm.

Similarly, the federal court in New York refused to grant an injunction on the grounds that the alleged breach of fiduciary duty was based upon an inadequate conversion ratio. The court stated:

> Such a loss, if proven, is compensable by monetary damages and accordingly does not result in irreparable injury. See, e.g., Hastings-Murtagh v. Texas Air Corp., 649 F. Supp. 479, 487 (S.D. Fla. 1986) (no irreparable harm because shareholders can seek damages if shares exchanged for inadequate consideration); McDonough v. First Nat'l Boston Corp., 416 F.

> Supp. 62, 64 (D. Mass. 1976) (directors' breach caused by transfer of shares for inadequate consideration could be remedied by damage recovery and therefore did not result in irreparable injury); In re Chromalloy Stockholders Litigation, C.A. No. 8537, 12 Del. J. Corp. L. 1061 (Del. Ch. Dec. 17, 1986) (where exchange ratio alleged to be unfair availability of money damages, "standing alone, is sufficient grounds to deny the application for a preliminary injunction"); Tomczak v. Morton Thiokol, Inc., C.A. No. 7861, 10 Del. J. Corp. L. 921 (Del. Ch. Feb. 13, 1985) (in response to plaintiff's [sic] claimed breach of fiduciary duty the court noted "if plaintiffs do succeed . . . money damages will be sufficient to make the[m] whole. Therefore, there has been no showing of the possibility of irreparable harm).

K/A & Co., Inc. v. Hallwood Energy Partners, L.P., Nos. 90 Civ. 1555(JFK), 90 Civ. 1683(JFK) and 90 Civ. 1793(JFK), 1990 WL 37866 at *2 (S.D.N.Y. March 26, 1990).

These cases, like the cases cited and analyzed in Defendants' Injunction Memorandum, show that plaintiffs have not pled any irreparable harm. Just as the plaintiff in Kahn, plaintiffs here have brought a claim based upon inadequate price, which is a claim compensable by money damages. Plaintiffs have altered their original complaint to aver that BPSI "may" not have sufficient liquid funds to pay fair value for the minority interest without any support. However, the Amended Complaint acknowledges that the minority interest has been converted into the right to receive a note for almost $83 million in an amount equal to $12,625 per share. Thus, it is absurd to suggest that plaintiffs' claims for injunctive relief should be kept alive because of the unsupported allegation that they suffer irreparable harm. Accordingly, both Counts VI and XIII are dismissed because plaintiffs have an

adequate remedy at law.

G. Plaintiffs Have Not Complied With The Statutory Requirements For An Appraisal

Count IX, which seeks improperly to have this Court conduct an appraisal hearing, has not materially changed from the original complaint and should be dismissed for the same reasons that doomed that claim originally, i.e., failure to comply with the statutory requirements for such a hearing. As pointed out in Defendants' Original Memorandum at 17-19, the subchapter that provides for dissenter's rights contains prerequisites for such an appraisal proceeding, none of which plaintiffs have satisfied.

For example, after a shareholder receives notice of the adoption of the corporate action, the shareholder must submit a demand for payment. 15 Pa. C.S.A. § 1575.[8] The BCL provides that a shareholder seeking dissenter's rights who fails to timely demand payment or to timely deposit certificates "shall not have any rights under this subchapter to receive payment of the fair value of his shares." 15 Pa. C.S.A. § 1576. After the corporation receives the demand for payment, it is required either to remit payment or send the dissenters certain information, including the company's estimate of the fair value of the shares. 15 Pa. C.S.A. § 1577(c).

If the dissenter believes the corporation's estimate of fair

8/ On December 17, 1999, BPSI gave the David Berwind Trust the notice to demand payment under the dissenter's rights provisions of the BCL. Amended Complaint at ¶ 48.

value is less than the fair value of the shares, he may send his own estimate of fair value to the corporation which shall be deemed a demand for payment of the amount or the deficiency. 15 Pa. C.S.A. § 1578(a). The statute further provides "where the dissenter does not file his own estimate under subsection (a) within 30 days after the mailing by the corporation of the remittance or notice, the dissenter shall be entitled to no more than the amount stated in the notice or remitted to him by the corporation." 15 Pa. C.S.A. § 1578(b).

Plaintiffs have done nothing to meet these requirements. Indeed, while the Amended Complaint avers that plaintiffs are being deprived of a fair price for the trust's shares (Amended Complaint at ¶ 112), not once does it allege what that fair price would be. See Warehime v. ARWCO Corp., 451 Pa. Super. 468, 472, 679 A.2d 1317, 1320 (1996) (dissenter's rights were exclusive remedy, but appellant had not complied with requirements of statute; instead he initiated litigation which was dismissed on preliminary objections in the nature of a demurrer). Thus, plaintiffs have not stated a claim for appraisal.

In addition, it is the corporation -- not the dissenters -- which has the right in the first instance to commence an appraisal proceeding. Section 1579(a) provides that within sixty days of the latest of effectuating the proposed corporate action, timely receipt of any demands for payment or timely receipt of any

estimates from any dissenters, the company may file in court an application for relief requesting that the court determine the fair value of the shares. A dissenter may not commence an action until after that sixty day window has expired, and the corporation has failed to start an appraisal action. 15 Pa. C.S.A. § 1579(d). Moreover, "court" is a defined term in the BCL and means the Court of Common Pleas of the judicial district embracing the county where the registered office of the corporation is or is to be located. 15 Pa. C.S.A. § 1103. Finally, nothing in the appraisal statute allows plaintiffs to bring a claim against the directors or majority shareholder. Rather, the statute directs that an appraisal proceeding be brought "in the name of the corporation." 15 Pa. C.S.A. § 1579(e). Thus, none of the named defendants should be parties to such a suit.

Therefore, in their Amended Complaint just as in their original complaint, plaintiffs have failed to demand payment, have failed to file an estimate of the fair value of the trust's shares, and have rushed prematurely into the wrong court seeking an appraisal proceeding against the wrong parties. They have not complied with any of the prerequisites to perfect dissenter's rights -- requirements which the statute expressly provides must be strictly obeyed or the dissenter cannot obtain additional funds over the amount offered by the corporation. In addition, plaintiffs have not followed any of the timing or forum

requirements of the statute, i.e., they cannot bring an action for appraisal until sixty days from the latest of several dates, and they cannot bring the action in the federal court but must instead initiate it in the Court of Common Pleas in the name of the corporation. Moreover, if plaintiffs have not taken the appropriate steps to perfect their dissenter's rights, they have no right to bring such a suit in any court. Accordingly, Count IX is dismissed.

H. Plaintiffs Lack Standing To Bring Direct Claims Against The Berwind Directors

Even if Counts VI through IX and XI did not fail for the reasons set forth above, they should still be dismissed as to certain defendants -- the present and former directors of BPSI -- because under the BCL, shareholders may not bring direct suits against directors. Again, this argument was raised in Defendants' Original Memorandum at 19-21, but, despite filing an Amended Complaint, plaintiffs have done nothing to cure this defect in their pleading.

15 Pa. C.S.A. § 1717 plainly provides that:

> [t]he duty of the board of directors, committees of the board and individual directors under section 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group.

(Emphasis added).

A federal district court has held that § 1717 bars direct claims and has dismissed claims against a company's board that were brought as a purported class action on behalf of a class of shareholders. B.T.Z., Inc. v. Grove, 803 F. Supp. 1019, 1022 (M.D. Pa. 1992) (" . . . plaintiff has no standing under the amended BCL to bring its action directly.")[9/] The Court found that "[i]n § 1717, the meaning is unambiguous. The Draftsmen's Comments to § 1717 underscore this language: `And a shareholder may not bring an action directly, but only in a derivative capacity, and would therefore be required to show the normal requisites with respect to such action.'" Id. (citation omitted) (emphasis in opinion).

Thus, any claims by plaintiffs as shareholders that are brought against the present or former directors of BPSI are barred for lack of standing by §1717 of the BCL. In Counts VI through IX, plaintiffs purport to assert direct claims against Berwind Partners and Berwind Directors arising from their status as shareholders of BPSI. In Count XI, plaintiffs make a claim against an individual director, C.G. Berwind, Jr. that he has acted to deprive the minority shareholder of the fair value of its interest in BPSI. Count XII seeks a declaratory judgment against all defendants. Accordingly, in addition to the reasons set forth above, all these Counts against the Berwind Directors are be dismissed for lack of

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9/ B.T.Z. also contains an analysis of the demand requirement, but, because it was decided prior to the Pennsylvania Supreme Court's decision in Cuker, the B.T.Z. analysis no longer reflects Pennsylvania law.

standing.

I. The Claim For Breach Of Trust Fails

Without providing any detail, plaintiffs have thrown in claims (Counts X and XIII)[10/] for breach of trust against two individual defendants (C.G. Berwind, Jr. and Bruce McKenney) who they claim have not effectively resigned as trustees of the David Berwind Trust. According to the Amended Complaint, C.G. Berwind, Jr. purported to resign as a trustee in 1997, but his resignation did not comply with the conditions for resignation in the trust documents, nor did he seek court approval. Amended Complaint at ¶ 41. Thus, it is uncontroverted that during the past two years neither C.G. Berwind, Jr., nor Bruce McKenney has had any dealings with the David Berwind Trust as a trustee, nor have the other trustees treated either individual as a trustee. The Complaint does not allege when Bruce McKenney purportedly resigned, only that he did not comply with the trust documents or seek court approval. Amended Complaint at ¶ 126.

While plaintiffs accuse Bruce McKenney and C.G. Berwind, Jr. of failing to appoint two successor trustees, these appointments would have been mere surplusage since (as the Amended Complaint admits) there were already five trustees for the David Berwind

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10/ Count XIII is somewhat ambiguous in that it appears to be brought against C.G. Berwind, Jr. and Bruce McKenney (Amended Complaint at ¶¶ 144-147), but it then asks for relief against all defendants. See "Wherefore" clause following Amended Complaint at ¶ 149. For purposes of this motion to dismiss, defendants will treat Count XIII as attempting to state a claim against the two individuals because nothing in the allegations of Count XIII would support an injunction against all defendants.

Trust. Amended Complaint at ¶¶ 1-4, 25, 32. Moreover, plaintiffs had no interest in any successor trustees because the purpose of the resignations was to separate the brothers' interests. Therefore, no one affiliated with C.G. Berwind, Jr. or Bruce McKenney would have been welcomed by plaintiffs as additional trustees. The breach of trust claim is dismissed.

Furthermore, plaintiffs cannot hold both C.G. Berwind, Jr. and Bruce McKenney liable as trustees. Bruce McKenney became a trustee only because he was appointed by C.G. Berwind, Jr. when C.G. Berwind, Jr. resigned as trustee. See Resignation of C.G. Berwind, Jr., dated June 26, 1997, attached hereto as Exhibit B. Thus, if plaintiffs are correct and C.G. Berwind, Jr. never resigned as trustee, then Bruce McKenney never became a trustee, and there is no basis for imposing liability upon him. Alternatively, if Bruce McKenney did become a trustee of the David Berwind Trust, then he replaced C.G. Berwind, Jr., and no liability can be imposed upon C.G. Berwind, Jr.

Finally, under Pennsylvania law, plaintiffs cannot impose liability upon either C.G. Berwind, Jr. or Bruce McKenney for any breach of fiduciary duty based upon their positions with Berwind Corporation or any of its subsidiaries and any purported conflict of interest. In Charles G. Berwind's Deed of Trust establishing the David Berwind Trust, he expressly waived any conflict of interest. See Deed of Trust of Charles G. Berwind dated February

29, 1963 f/b/o David McMichael Berwind, et al., attached hereto as Exhibit C at 7:

> The fact that any trustee may be interested in Berwind Corporation or any of its subsidiaries as director, stockholder, manager, agent or employee shall not constitute an adverse or conflicting interest, and the acts of such trustee shall be judged as if he has no interest in the Corporation.

Pennsylvania courts have upheld the decision by the settlor to waive the application of the rule of undivided loyalty. Estate of McCredy, 323 Pa. Super. 268, 297, 470 A.2d 585, 600 (1983) (citing cases). Accordingly, David Berwind's father precluded the very type of surcharges he seeks to impose against his brother and another former trustee in Count X. Therefore, this claim should be dismissed.

J. Plaintiffs' Claim For Declaratory Judgment Fails Because A Declaratory Judgment Is A Remedy Not A Cause Of Action

Finally, plaintiffs have added a claim for Declaratory Judgment in Count XII of the Amended Complaint. Plaintiffs seek a declaration from the Court that the Plan of Merger be declared null and void based upon conclusory allegations that the merger did not comply with the BCL, even though, as set forth in Defendants' Injunction Memorandum at 1-2, the merger was specifically contemplated and authorized by the BCL. Count XII is dismissed for two reasons. First, declaratory judgment is a remedy, not a cause of action. In re Downingtown Indus. & Agricultural School, 172 B.R.

813, 823 (Bankr. E.D. Pa. 1994) ("a declaratory judgment is a procedural device and not a cause of action unto itself."). See also Luckenbach Steamship Co. v. United States, 312 F.2d 545, 548 (2d Cir. 1963) ("Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated.").

Second, even if there were such a cause of action, Count XII still would fail as a matter of law given that none of plaintiffs' other claims are valid. In other words, because defendants' actions with respect to the merger were proper, there is no basis on which to declare the Plan of Merger null and void. As such, Count XII should be dismissed.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GAIL B. WARDEN, et al.	:	CIVIL ACTION
v.	:	
M.B. MCLELLAND, et al.	:	NO. 99-5797

O R D E R

AND NOW, this 8th day of August, 2001, upon consideration Defendants' Motion to Dismiss the Amended Complaint (Docket No. 12), Plaintiff's response thereto (Docket No. 14), and Defendants' reply (Docket No. 19), IT IS HEREBY ORDERED that said Motion is **GRANTED**.

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of Defendants and against Plaintiffs.

BY THE COURT:

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HERBERT J. HUTTON, J.